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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1028

MELVIN JONES, HAROLD JAMES CUTNO, AND CLIFFORD JOHN WOODS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 35–43; Pet. App. A6–A14) is reported at 223 F. Supp. 104. The opinion of the court of appeals (R. 225–229; Pet. App. A1–A5) is reported at 339 F. 2d 419.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1964 (R. 230), and petitions for rehearing (R. 232–240; Supp. R. 1–2) were denied on February 9, 1965 (R. 241). On March 10, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including March 31,

1965, and the petition was filed on March 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Federal officers, while occupying a motel room at the invitation of the owner-manager, removed the removable control panel from their side of a dual gas heater built into the common wall between their room and a room occupied by petitioners. As a consequence of the fact that the corresponding panel on the petitioners' side had previously been removed by a person or persons unknown, it was possible for the officers to observe incriminating conduct by petitioners, and to overhear incriminating conversation, through an aperture in the heater. The question presented is whether the officers' action violated any right of petitioners protected by the Fourth Amendment.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Counts 1 and 2 of a three-count indictment (R. 1–2), filed August 16, 1963, in the United States District Court for the Eastern District of Louisiana, charged that petitioners and a codefendant named Jimmy

Martin conspired to sell and conceal (count 1) and received and concealed (count 2) described quantities of heroin hydrochloride, knowing the same to have been illegally imported into the United States, in violation of 21 U.S.C. 174. Count 3 related to Martin alone and is not at issue here. Following a trial by jury, petitioners were found guilty on both of the counts involving them (R. 212),[1] and each was sentenced to six years' imprisonment on each count, the sentences to run concurrently (R. 63, 65–66, 78–80).[2] The court of appeals affirmed (R. 230).

Prior to trial the defendants moved to suppress the use as evidence of the narcotics involved on the ground that they had been seized by federal narcotics agents in violation of the accused's Fourth Amendment rights (R. 4, 6–10, 88). Following a hearing (R. 84–112), the motion was denied (R. 35–43; Pet. App. A6–A14). The motion was thereafter renewed at the trial and again denied (R. 119), and the narcotics were received in evidence (R. 129 *ff.*).

The facts pertaining to the constitutional question—the only issue raised by the petition—are not in dispute, and may be summarized as follows:[3]

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[1] Martin pleaded guilty on counts 1 and 2, and count 3 was dismissed on motion of the government (R. 58).

[2] The sentences further directed that "if 18 U.S.C. 4208(a)(2) is applicable, eligibility for parole shall be subject to the provisions of that section." The provision referred to authorizes the court to designate the maximum sentence a defendant shall be required to serve and to specify that he may become eligible for parole at such time within that period as the board of parole may determine is appropriate.

[3] The summary is a composite of the evidence adduced at the pre-trial hearing and at the trial.

In July 1963, agent Douglas Chandler of the Federal Narcotics Bureau received information that heroin was being sold somewhere on Shrewsbury Road in Jefferson Parish, Louisiana (R. 89, 90, 155, 173). At 10 a.m. on July 16, in an attempt to determine the location of this activity, Chandler telephoned Ellis Marsalis, the owner and operator of Marsalis Mansion Motel, located at 110 Shrewsbury Road, and inquired whether he had any reason to suspect any of the guests at his motel of being engaged in illegal activities (R. 89–90, 166). The agent was acquainted with Marsalis, having met him in connection with a case he had worked on two or three years previously (R. 89–90, 156–157). Marsalis told the agent that he did have such suspicions, and at 2 p.m. the two met and conversed at an address on Baronne Street (R. 90). In the course of their conversations, Marsalis and the agent discussed the activities of the occupants of Room 7 of the motel, which was registered in the name of the defendant Martin (R. 90, 94). At the afternoon meeting Chandler showed Marsalis photographs of suspected heroin addicts and peddlers, and Marsalis said that he thought he had seen at least one of such persons in Room 7 (R. 94). Chandler asked Marsalis to save the contents of the room's wastebasket when it was routinely emptied that evening (R. 93). Marsalis agreed to do so, and made an appointment to meet the agent at the motel at 8 p.m. (R. 89–90, 93).

At 8 p.m., Chandler and another narcotics agent, Fritz Engleking, met and conferred with Marsalis in the office of the motel, where the agents examined the material which had been discarded that day in the

Room 7 wastebasket (R. 89–90, 93, 171, 173). Among the discarded items were some empty capsules and a piece of wrapping paper bearing a special delivery stamp and a Brooklyn, New York, return address (R. 93). Marsalis, who had at some point told the agents that it might be possible for them to see into Room 7 from an adjacent room, No. 6, through a common wall which separates the rooms, thereupon admitted the agents to Room 6 and left them there alone (R. 91, 92, 157).

Built into the wall between the two rooms is a dual "Sunair" gas heater, approximately five feet high and a foot and a half wide, designed to warm both rooms. The heater as a whole protrudes into each room a few inches. It is divided into two separate units, one for each room, each unit being equipped with its own control knobs and thermostat. Near the base of each unit, and flush with it, is a removable panel, designed to be lifted out by inserting a finger in a hole built into the panel for this purpose. The panel must be removed in order to light the heater. Guests are permitted to operate their own heaters and to light them when they wish (R. 142–143; G. Exs. 1–4, 9).[4]

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[4] Government exhibits 1–8, inclusive, are photographs of the heater, including various close-up aspects of it, showing how it is possible to see from one room into the other when both control panels are removed. Government exhibit 9 is a statement by Mr. Marsalis, the owner-operator, explaining how the heater works and the policy of the motel with respect to the operation of the units by guests. The exhibits were filed in the district court without objection following the hearing on the motion to suppress, and are on file in the office of the Clerk of this Court. Seven extra copies of each of the photographic exhibits have also been lodged with the Clerk.

The agents, on being admitted to Room 6, proceeded to search for "some method of seeing or hearing into" Room 7 through the common wall (R. 92). They removed the control panel on their side of the heater and saw that there was "a similar heater on the other side of the wall, which exactly matched" the one in their room (R. 142–143). They further found that, as a result of the fact that the control panel for the other room had already been removed by some unknown person (R. 157, 185),[5] they could see into the room through a space in the heater between the positions where the panels are normally located (R. 92, 143; see G. Exs. 5–8). Because this aperture was close to the floor, it was necessary for the agents to lie on the floor in order to see through (R. 157–158, 164). From this position it was possible for them to see "most of the opposite wall [of Room 7] and all in between" (R. 92).

There was no one in Room 7 when the agents commenced their surveillance, shortly after 8 p.m. Approximately an hour later, petitioner Cutno and the defendant Martin arrived in the room, followed five minutes later by petitioners Jones and Woods (R. 94–95, 100, 142). During the next two to two and a half hours, the agents observed the room's occupants

[5] Both agents denied that they had removed the Room 7 panel (R. 157, 185). Agent Chandler testified that he had no idea how the panel was removed (R. 164). Agent Engleking, questioned as to whether he had asked Mr. Marsalis who had removed the panel, stated that he had not (R. 185). Except for the filing by the government of the (unsworn) s ent by Marsalis explaining how the heater works and the mo. 's policy regarding its operation by guests (see n. 4, *supra*), Marsalis was not called as a witness by either side, either on the motion to suppress or at the trial, nor did any of the defendants testify on either occasion.

and listened to their conversations through the opening (R. 95, 99–102, 160–161). They heard them discuss the price of heroin, places where it could be concealed, and persons involved in the narcotics traffic, observed them handling what appeared to be narcotics and counting money, saw petitioner Jones inhale a substance which appeared to be heroin, and heard each of the accused converse on the telephone with a person who appeared to be a supplier of the drug (R. 100–103, 143–145, 174–175). At about 11:30 p.m., as Jones and Woods started to leave, they were intercepted by the agents in the corridor outside Room 7 (R. 95, 102). Jones dropped a bag containing 301 capsules of heroin as he was arrested (R. 102–103, 131–134, 147, 175–176, 184). Woods escaped and was captured some time later (R. 95). Cutno and Martin were arrested in Room 7, a search of which resulted in the discovery of other narcotics (R. 95, 102, 134–137, 178–179). No warrant had been obtained or sought (R. 95–98).

ARGUMENT

Since it is clear (and petitioners do not deny) that the knowledge possessed by the officers as a result of what they saw and heard through the common wall between the motel rooms was more than ample, if lawfully procured, to justify the agents in promptly arresting the accused, without warrants, when some of them started to depart, and, incidentally thereto, effecting the contemporaneous seizures which were made (see, *e.g.*, *Preston* v. *United States*, 376 U.S. 364, 367, and cases cited), the sole question presented is the legality under the Fourth Amendment of the means

used by the officers to obtain this knowledge. We sub
mit that under the decisions of this Court the officers'
acts violated no right of petitioners which the Con
stitution protects.

It is settled law that eavesdropping which does not
involve an "unauthorized physical encroachment
within a constitutionally protected area" does not
violate the Fourth Amendment. *Silverman* v. *United
States*, 365 U.S. 505, 510; *Clinton* v. *Virginia*, 377 U.S.
158; *Lopez* v. *United States*, 373 U.S. 427, 438–439;
On Lee v. *United States*, 343 U.S. 747, 751–754; *Gold
man* v. *United States*, 316 U.S. 129, 134–135; *Olmstead*
v. *United States*, 277 U.S. 438, 463–466; *Anspach* v.
United States, 305 F. 2d 48, 305 F. 2d 960 (C.A. 10), cer
tiorari denied, 371 U.S. 826. Here, as both opinions be
low point out (Pet. App. A4, A13), there was no physical
penetration of the petitioners' premises. The agents
were in the room from which they conducted their sur
veillance at the express invitation of the owner-man
ager.[6] Their removal of the control panel on their side of
the dual heater involved no trespass upon, or physi
cal invasion of, petitioners' quarters. It is undis
puted that the control panel for each room was
manufactured with a finger-hole in it, for the explicit
purpose of making it easily removable. It is true that
the ordinary reason for removing the panel was to
light the heater (a function which guests were per
mitted by the management to perform for themselves)
and that the officers' purpose here was to eavesdrop.
But since removal of the panel in the one instance
would concededly not be a trespass, "it is difficult to

[6] Contrast *McDonald* v. *United States*, 335 U.S. 451, 453.

see," as the district court observed, "how it would constitute a trespass in another" (Pet. App. A13). For as the court pointed out, "the rule applied by [this] Court is not grounded on intent; it is distinctly defined in terms of penetration down to the 'fraction of an inch' [*Silverman, supra,* 365 U.S. at 512]," and "[h]ere there was no penetration even a fraction of an inch further than the agents were entitled to go" (Pet App. A13).

As the district court further remarked, moreover, petitioners "were required to take [their] room as they found it, complete with the possibility that someone might remove the heater panel in Room #6 and observe and overhear their conduct" (Pet. App. A13). What the officers did here was no different in principle than if, to eavesdrop, they had opened one of two adjacent doors separating two rooms of a hotel (*Anspach* v. *United States,* 305 F. 2d 48, 50 (C.A. 10), certiorari denied, 371 U.S. 826) or the door of a medicine cabinet installed in the common wall between two apartments (*Clinton* v. *Commonwealth,* 204 Va. 275, 277, reversed on other grounds *sub nom. Clinton* v. *Virginia,* 377 U.S. 158), or if they had looked through a keyhole, or over a transom, from a hallway where they had a right to be (*McDonald* v. *United States,* 335 U.S. 451, 458 (Mr. Justice Jackson, concurring)). The fact that keyholes and transoms are not made for this purpose—to take the last-cited example—has no bearing on whether such actions by officers infringe constitutional rights of the persons observed. Nor would the case be different, to pursue the keyhole analogy, if it were necessary for the of-

ficers, in order to have a clearer view of the room they desired to see into, to first remove some easily removable obstruction from their side of the door—*e.g.*, a key from the keyhole, or a towel draped over the doorknob.

Petitioners' contention that under Louisiana law the officers committed a trespass in removing the control panel in the officers' room (Pet. 12–14) is without merit. The provision of local law relied upon—Article 696 of the Louisiana Civil Code, providing that "One neighbor can not, without the consent of the other, open any window or aperture through the wall held in common, in any matter [manner] whatever, not even with the obligation, on his part, to confine himself to lights, the frames of which shall be so fixed within the wall that they can not beopened"—obviously applies to party walls separating the lands or estates of adjacent property owners. Even if the statute were otherwise germane, therefore—and we fail to see its pertinence to a situation like that in this case—it plainly has no relevance to the walls between rooms of a hotel or motel, the occupants of which are merely transient guests.[7] Moreover, petitioners' contention, even if

[7] For the same reason petitioners misplace their reliance (Pet. 13–14) on the provision of Louisiana law by which adjacent property owners whose estates are separated by a party wall are considered to own the wall "in indivision," *i.e.*, in common (see *Weill* v. *Baker, Sloo & Co.*, 39 La. Ann. 1102, 1103–1104 (1887); 1 Planiol and Ripert, *Treatise on the Civil Law* (12th ed. 1939, translated by the Louisiana State Law Institute), Part 2, pp. 477–478). Furthermore, even if this provision were somehow pertinent to the walls between motel rooms, it is not apparent how the fact would advance petitioners' argument.

sound, would be inapposite. For, as this Court observed in *Silverman* v. *United States, supra,* 365 U.S. at 512, the reach of the Fourth Amendment does "not turn upon the technicality of a trespass upon a party wall as a matter of local law," but "upon the reality of an actual intrusion into a constitutionally protected area." Finally, it is irrelevant that the officers, in observing petitioners through the aperture in the heater, may possibly have violated Louisiana's "Peeping Tom" statute.[6] A like argument, as noted by the district court (Pet. App. A13–A14), was expressly rejected by this Court in *Olmstead* v. *United States,* 277 U.S. 438, 466–469.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

APRIL 1965.

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[6] La. Rev. Stats. (1950), § 14:284, making it an offense for any person to "perform such acts as will make him a 'Peeping Tom' on or about the premises of another." "Peeping Tom" is defined as "one who peeps through windows or doors, or other like places, situated on or about the premises of another for the purpose of spying upon or invading the privacy of persons spied upon without the consent of the persons spied upon."

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